IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~16 Misc.~~ 393 392

NATHAN WISSNER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF

On Petition for a Writ of Certiorari to the County Court of Westchester County, State of New York

I. MAURICE WORMSER,
J. BERTRAM WEGMAN,
RICHARD J. BURKE,
Counsel for Petitioner.

TABLE OF CASES

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The respondent proceeds upon an apparent misconception of the nature of petitioner Wissner's complaint. Petitioner does not contend that a joint trial of two or more defendants may never be had where one defendant has confessed, or that juries are incapable of following instructions, nor does petitioner "inferentially denounce our jury system", as respondent professes to suppose. These are straw men: they do not touch the point petitioner actually raises.

Petitioner's point is that in the peculiar circumstances of his case there occurred an absolutely unprecedented departure from the principle of due process of law, and thus there is necessarily present a constitutional question not heretofore considered either by the New York courts or by this court. None of the cases cited by the respondent deal with this problem. These circumstances are as follows:

(1) The case against petitioner—who had not confessed—was *notably weak*, apart from the references to him in the confessions of his co-defendants,

(2) The confessions of not one but two co-defendants named him a total of 88 times, accusing him of being the person who fired the fatal shot,

(3) A separate trial, sought for that reason having been denied, the Court *refused* to delete his name from the confessions when he repeatedly *requested* such protection,

(4) The references to him, which the Court had refused to delete, were effectively used against him by the prosecutor and the Court itself.

Respondent's reference to Wigmore on Evidence (at p. 54 of its brief), is not apposite, although many of the American cases cited by Wigmore, *do* require the names of defendants, other than the confessor, to be deleted from the confession. Some of these are *People* v. *Buckminster*, 274 Ill. 435, 113 N. E. 713, *People* v. *Durand*, 321 Ill. 526, 152 N. E. 569, *Miller* v. *People*, 98 Colo. 249, 55 Pac. 2d, 320, *People* v. *Sweetin*, 325 Ill. 245, 156 N. E. 354, *People* v. *Blumenfeld*, 351 Ill. 87, 183 N. E. 815.

But in none of the cases cited by Wigmore, nor in any other cases that have been found, did the defendant (as here) specifically *request* the deletion of his name from the confessions of his co-defendants.

In the present case, the Trial Court explicitly adverted (R. 1280) to its familiarity with the *Malinski* case (324 U. S. 401), and was therefore presumably familiar with this Court's description (at p. 411) of the method there adopted for protecting the other persons named in Malinski's confession, viz., the deletion of their names; but, despite its familiarity with that procedure, it repeatedly refused, *without reason*, petitioner's urgent request that it be adopted.

Nor has any reason ever been expressed at any stage of this case—not even here in respondent's brief—why peti-

tioner's name should not have been deleted from the confessions as read to the jury, why this obviously highly prejudicial ex parte testimony should have been insinuated into the jurors' minds. Other deletions were made, but not these.

This is not a situation involving a question merely of state procedure rather than due process. As was said in *Snyder* v. *Massachusetts*, 291 U. S. 97, 116-117, "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. * * * What is fair in one set of circumstances may be an act of tyranny in others."

And in *Lisenba* v. *California*, 314 U. S. 219, 236, this principle was expressed as follows:

> "The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce such rule as she elects, whether it conform to that applied in the Federal or in other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law."

Thus, for example, this Court has, under certain circumstances, upheld the right of the states to withhold from a defendant the assistance of counsel, and in other circumstances has found in such case an invasion of the defendant's Fourteenth Amendment right to due process, saying in *Gibbs* v. *Burke*, 337 U. S. 773, 781,

> "The due process clause is not susceptible of reduction to a mathematical formula. * * * Obviously a fair trial test necessitates an appraisal before and during the trial of the facts of each case to determine whether the need for counsel is so great that the deprivation of the right to counsel works a fundamental unfairness."

Here the question is whether, *under the special and unusual circumstances of this case*, the deliberate refusal of the Trial Court to delete the petitioner's name from the co-defendants' confessions worked a fundamental unfairness.

It cannot be doubted that the right to cross-examine one's accusers is basic in our system of jurisprudence; "* * * these rights include, as a minimum, a right to examine the witnesses against him * * *." *Re Oliver*, 333 U. S. 257, 273. The policy of the due process of law clause of the Fourteenth Amendment was stated in *Williams* v. *New York*, 337 U. S. 241, 245, to be "in part that no person shall be tried and convicted of an offense unless he * * * is afforded an opportunity to examine adverse witnesses."

New York could not validly legislate, or decide in so many words, that a defendant at a criminal trial would not be permitted to cross-examine the witnesses produced against him. What it could not do directly it ought not be permitted to do by indirection.

To speak of petitioner's point as involving a matter merely of state procedure, is to permit sterile semantics to pervert the realities of the situation. The realities are that at a trial for a capital offense, where the evidence against him would otherwise have been weak, the Court insisted upon permitting his two co-defendants, in effect, to testify against him without subjecting themselves to cross-examination.

The refusal to delete Wissner's name from the confessions of his co-defendants, when such protection was requested, had the effect of converting those confessions into lengthy and detailed accusations against Wissner, and enabled the Trial Court, in its charge to the jury, to stress portions of the confessions which were *accusatory* of Wissner, rather than against the interest of Cooper and Stein. (Such accusations will be found quoted at the bottom of page 21 and the top of page 22 of petitioner's brief in support of his petition for a writ of certiorari.)

To say that under such circumstances a trial is permeated with fundamental unfairness is not at all to say (as respondent claims) that a joint trial can never be conducted fairly, or that instructions to a jury can never be adequate protection. It is to say that in the unprecedented circumstances here present, the joint trial was not fairly conducted, and instructions here given to the jury were not and could not be adequate protection.

It is in order to conceal those circumstances that respondent seeks, by omission and by distortion, to gloss over the weakness of the evidence actually admissible against Wissner. Thus, it discusses the identification by the witness Waterbury of Wissner as a participant in the robbery, without any mention of the circumstances which rendered such identification incredible, viz., that although Waterbury agreed he had seen the man who did the shooting for only a couple of seconds, and claimed that the man wore a *large false nose* attached to the frames of a pair of eyeglasses, without any glass in them, under a felt hat, he nevertheless purported to be able some months later to identify Wissner as that man. Nor does the respondent refer to the amazing circumstance that Waterbury, in his statement to the District Attorney one hour after the crime, not only omitted all reference to the false nose and eyeglass frames, stating merely that none of the robbers wore masks, but was also unable to state whether they wore hats or to describe their clothing. At the trial, however (*after* the State Police had found fragments of a false nose and eyeglass frames a mile and a half from the scene of the crime, and after Cooper and Stein, in their confessions to the police, had purported to describe the clothing allegedly worn by Wissner) Waterbury affected to remember the hat and jacket supposedly worn by Wissner, as well as the false nose and empty eyeglass frames.

This was a witness who was unable to identify, at the trial, when they were severally brought into the courtroom for his inspection, any one of the seven much taller State Troopers whom he had examined at a police "line-up" with Wissner, although his opportunity to examine these Troopers in the "line-up" was far more protracted in time than had been his opportunity at the time of the crime to observe the disguised bandit. Strangely selective and phenomenal powers of observation and memory had to be attributed to a witness who, upon cross-examination, nevertheless gave as his answer to 386 different questions, "I don't remember".

Similarly, in discussing the testimony of the witness Homishak (respondent's brief p. 18) respondent would have Homishak testify that he saw Wissner, with Dorfman and the others, on the morning of the day of the crime "in the vicinity" of the Wissner-Dorfman rental agency, Homishak actually having testified not about "the vicinity" but that he saw them "in the office" of the rental agency. The misquotation is not inadvertent: the purpose is to soften the clash between the accomplice witness Dorfman and Homishak on this subject, Dorfman having said their meeting-place was not in the office, but in a restaurant in the vicinity. And, in the next sentence of its brief, respondent makes it appear that Homishak testified that Wissner "left the premises" with the other defendants on the morning of the day of the crime, whereas Homishak actually testified that—having himself left the premises—he was not present to see the defendants leave Wissner's place of business on that day and, hence, had no knowledge whether they had left together or separately.

Such distortion, unless pointed up, might conceal the fact that the case against Wissner in actuality depended entirely upon the testimony of the disreputable accomplice Dorfman, there being no other testimony to connect him with the crime, absent the confessions of Cooper and Stein.

The weakness of the case against him was one of the elements distinctive of this case which, in combination with the Court's ruling at the joint trial refusing him effective protection against the crushing effect of the two other defendants' confessions resulted in fundamental unfairness as to petitioner.

We earnestly urge that the Petition should be granted.

Respectfully submitted,

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